

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 62926-3-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
SAMUEL RYAN,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>March 8, 2010</u>
)	
)	

Cox, J. — Samuel Ryan appeals from the third sentencing following his convictions for first degree robbery and three counts of kidnapping. His counsel raises double jeopardy and ineffective assistance of counsel issues. In a pro se brief, Ryan additionally asserts his resentencing was vindictive. We affirm.

Ryan entered an auto parts store in Renton on the evening of December 5, 2002. There were four people present. Ryan pointed a loaded gun at them and ordered them into a bathroom in a back warehouse. Ryan forced one of the employees, Carl Freeman, to bind the other three with duct tape and place tape over their eyes and mouths. Ryan held Freeman at gunpoint and forced him to empty cash registers and lock boxes and open the store safe. Ryan pocketed the money. Ryan returned to the bathroom with Freeman. Ryan bound each of

the four victims is separate locations in the warehouse, in places where they were unlikely to be found. Unknown to Ryan, one of the victims had managed to alert the police, who arrested Ryan as he left the store. Ryan had \$1,100 in his pocket and a loaded handgun. He made a full confession.

The State charged Ryan with first degree robbery with a firearm enhancement, and three counts of first degree kidnapping, each with a firearm enhancement. Ryan waived his right to a jury trial and proceeded to a bench trial on stipulated evidence. The court found Ryan guilty of all four charges.

The trial court first sentenced Ryan in August 2003. Relying on prior convictions from California and Illinois, the court imposed concurrent mandatory life sentences on each count under the Persistent Offender Accountability Act. The court also imposed firearm enhancements totaling 240 months to run consecutive to the life sentences. Ryan appealed. The State conceded it had not shown that the Illinois conviction was comparable to a Washington offense countable as a strike under the POAA. This court remanded the case for an evidentiary hearing to allow the State to prove the classification of the disputed conviction. This appeal was mandated on October 15, 2004.¹

The trial court sentenced Ryan for the second time in February 2005. The State could not prove the Illinois conviction was comparable to a Washington offense. The trial court found that all three of the kidnapping convictions merged into the robbery and imposed a high end sentence of 68

¹ State v. Ryan, No. 52892-1-I, noted at 123 Wn. App. 1004 (2004).

months on the robbery conviction, plus a 60 month firearm enhancement, for a total of 128 months. The State appealed. While the appeal was pending, the Supreme Court resolved State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005), holding that kidnapping does not merge with robbery. Ryan then filed a cross-appeal, raising a number of issues. This court reversed on the basis of Louis, rejected the issues raised in the cross-appeal, and remanded the matter for a third sentencing. This appeal was mandated on September 12, 2008.²

In January 2009, Ryan filed a motion in the trial court titled “Submission of Legal Claims”. The superior court transferred the motion to the court of appeals for consideration as a personal restraint petition (PRP). The court dismissed the PRP on procedural grounds in July 2009.³ Ryan subsequently filed another PRP, which has been stayed pending a decision in this appeal.⁴

The trial court sentenced Ryan for the third time in January 2009. The court imposed a sentence of 130 months for the robbery, 85 months for one of the kidnappings, and 61 months for each of the other two kidnappings. All of the sentences are mid-range for the offense and offender score applicable to that offense. The trial court also imposed a 60 month firearm enhancement for each offense. The court ordered that the sentences for the three kidnapping convictions be served consecutively but concurrent with the robbery offense.

² State v. Ryan, No. 55871-4-I, noted at 136 Wn. App. 1051 (2007).

³ PRP of Ryan, No. 62905-1-I.

⁴ PRP of Ryan, No. 62935-2-I. We denied Ryan’s motion to consolidate this PRP with his appeal.

The firearm enhancements are also to be served consecutively. The total term of confinement imposed is 447 months. Ryan appeals from this third sentencing.

DECISION

Most of Ryan's issues revolve around his contention that double jeopardy bars his multiple convictions and multiple sentencing enhancements. He also raises a claim of ineffective assistance of counsel and denial of due process. Pro se, Ryan additionally argues that he had been the victim of vindictive action by the trial judge and the prosecutor, and has been denied due process. We discuss each issue below.⁵

Issue 1: Ryan contends that the kidnappings were incidental to and in furtherance of the robbery, and that his convictions for all four offenses therefore violate double jeopardy. He relies on State v. Korum, 120 Wn. App. 686, 86 P. 3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614 (2006).⁶ We specifically addressed this issue in our second opinion in this case, rejecting it under State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005). Ryan urges us to revisit our " cursory analysis " as based on an " incorrect understanding of double jeopardy ". We decline the invitation and adhere to our prior decision.

⁵ The State contends that Ryan is now barred from raising most of his issues because they could have been or were raised in his earlier appeals and his PRP. We have the discretion not to consider these issues. State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993). But we note that there has been significant case law development since the first appeal and that many of the issues will simply be raised again in some other context if we decide now not to reach the merits. We therefore address them.

⁶ The Supreme Court did not reach the double jeopardy issue as resolved by the Court of Appeals in Korum because the State did not properly preserve it. State v. Korum, 157 Wn.2d 614, 625, 141 P.3d 13 (2006).

Issue 2: Relying on the Korum court's application of State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), Ryan argues that the kidnappings were "incidental", done solely to facilitate the robbery, and not independent crimes. He therefore contends that the evidence is insufficient to sustain the kidnapping convictions. But unlike the facts in Green, the victims of the kidnappings in this case were different from the victim of the robbery. Under similar facts, the Supreme Court rejected this same argument in State v. Vladovic, 99 Wn.2d 413, 424, 662 P.2d 853 (1983). We similarly reject it here.

Issue 3: Ryan argues that imposing four firearm enhancements based on the use of a single gun during one incident violates his double jeopardy rights. He contends that a "unit of prosecution" analysis bars the imposition of multiple punishments for the same incident and the same weapon. We rejected a similar argument in State v. Ward, 125 Wn. App. 243, 251-52, 104 P.3d 670 (2004) and adhere to its reasoning.

Issue 4: Ryan contends that because the firearm enhancements are both elements of the underlying offenses and elevate those same offenses to more serious crimes, the imposition of additional punishment for the firearm enhancements violates double jeopardy. We also specifically addressed this issue in our second opinion in this case, rejecting it under State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006).⁷ While this appeal was pending, the Supreme Court decided State v. Kelley, No. 82111-9, 2010 WL 185947 (Wash.

⁷ We also addressed the issue in State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007) and followed Nguyen.

Jan. 21, 2010), citing Nguyen with approval and resolving the issue against Ryan. Under the circumstances, we also decline to revisit this issue.

Issue 5: Ryan argues that his counsel in his third sentencing was ineffective in unreasonably failing to seek a sentence below the standard range. He contends counsel told the court it lacked authority to impose a sentence below the standard range and failed to argue for such a sentence based on the fact that Ryan took responsibility for his actions and that the cumulative effects of his multiple convictions made the sentence unduly harsh.

To demonstrate ineffective assistance, Ryan must make two showings: first, that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances, and second, that there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient representation. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant must overcome a strong presumption that counsel's representation was not deficient and the court must make every effort to eliminate the distorting effects of hindsight. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The burden is on the defendant to show deficient representation based on the record established in the trial court proceedings. McFarland, 127 Wn.2d at 335. If a defendant fails to make either of the two showings, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). If counsel's conduct can be characterized as legitimate trial strategy or tactics, counsel's performance is not

deficient. Kyllo, 166 Wn.2d at 863.

Ryan's contention that his counsel misled the court is not correct. Defense counsel argued for a sentence at the low end of the standard range, pointing out that Ryan acknowledged that his conduct was wrongful. Counsel commented that

It also seems that, I think the Court's hands are somewhat tied in the sense of what the Court can impose, but the sentence, while his conduct merits a sentence reflecting the seriousness of his acts, it seems, this sentence seems to go beyond what is necessary to punish for these acts.^[8]

There are many reasons why the sentencing court's options were limited, including the separate nature of the offenses and the sentencing enhancements. Commenting that the court's hands were "somewhat tied" is not telling the court it could not impose sentence below the standard range. Ryan relies on State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). But here, unlike in McGill, there is no clear basis for a downward departure from the standard range. Ryan has accordingly not overcome the strong presumption that counsel's representation was not deficient.

Although we could end the inquiry because Ryan has not made the first showing to support a claim of ineffective assistance, we note that counsel actually presented the arguments that Ryan now asserts may have justified an exceptional sentence below the standard range, only in the context of arguing for a sentence at the low end of the standard range. However, the trial court

⁸ Report of Proceedings (January 23, 2009) at 10.

rejected the arguments and imposed a mid-range sentence. Ryan accordingly cannot demonstrate that the outcome of his sentencing would have been different if counsel had advocated for an exceptional sentence rather than a sentence at the low end of the standard range. He thus also fails to make the second required showing to support his claim.

Issue 6: Ryan finally argues that his sentence was impermissibly elevated based on judicial fact finding without proof beyond a reasonable doubt to a jury. He contends that a jury, and only a jury, can determine whether his offenses were “separate and distinct”. Ryan recognizes that the Supreme Court rejected this argument in State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005) but invites us to reconsider Cubias. We decline the invitation.

Ryan raises several issues in his pro se Statement of Additional Grounds. His arguments are not clearly delineated and often mix different legal principles. We address them as best we understand them.⁹

Ryan first contends that the imposition of multiple punishments in response to his appeals violates the Fifth Amendment to the U.S. Constitution and the Washington Constitution and violates double jeopardy principles. We believe this argument has been addressed in our discussion of the double jeopardy issues raised by counsel. He argues that because he received concurrent life sentences in his first sentencing but consecutive sentences in his third sentencing, he was punished for exercising his right to appeal. We

⁹ Ryan also includes a pro se motion to dismiss his kidnapping charges in the furtherance of justice under CrR 8.3. This motion is not properly brought in the court of appeals and we accordingly deny it.

address this issue below. He contends that punishment for kidnapping charges that are incidental to a crime violates double jeopardy. We have addressed this issue. Ryan claims he is the victim of vindictive judicial action because he was sentenced to concurrent terms and then later sentenced to consecutive terms after his successful appeal. We address this issue below. He also argues that the kidnapping offenses should have been dismissed because the trial judge in the second sentencing ruled that they were incidental to the robbery. But we reversed this determination and it is not binding on the trial court in the later sentencing proceedings.

Ryan next argues that increasing his punishment for exercising a constitutional or statutory right, and that the imposition of consecutive sentences in his third sentencing is prosecutorial vindictiveness. We address this issue below.

Ryan next contends that imposing consecutive sentences on the kidnapping charges without a jury finding beyond a reasonable doubt violates due process. But Ryan waived his right to a jury trial. Relying on State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006), he argues that he did not waive his right to have a jury determine aggravating factors. But Hagar is inapposite. In Hagar, the defendant pled guilty, stipulating to “real facts” for sentencing. At sentencing, the trial court determined that Hagar’s offenses constituted a major economic offense. The Supreme Court reversed, finding that Hagar’s stipulation to facts was not a stipulation that his crimes constituted a major economic

offense. Hagar, 158 Wn.2d at 374. In this case, Ryan waived his right to a jury trial and stipulated to certain facts, after which the court found him guilty, entering findings of fact that encompassed both the underlying offenses and the facts supporting a sentence enhancement. As the court noted in Hagar, the court's sentence must rest on facts reflected in the verdict. Hagar, 158 Wn.2d at 373. The verdict in this case was the verdict reached by the court on the stipulated facts. The sentencing court determined that the offenses were separate, which is permitted, but did not rely on any other facts in imposing its sentence. We therefore reject this argument.

Ryan contends that because he did not know he had a right to have a jury find any aggravating factors, and was not so advised, he could not have waived this right. This argument is entirely unsupported by the record and we therefore reject it.

Ryan finally contends the imposing a firearm enhancement without a jury finding beyond a reasonable doubt violates due process and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). But Ryan waived his right to a jury trial and the trial court explicitly found that he was armed with a functional handgun. There was no due process violation. Ryan also contends that a firearm enhancement makes his sentence an illegal exceptional sentence, and that the exceptional sentence provisions of the Sentencing Reform Act are unconstitutional. But an enhancement increases the standard or presumptive sentence and the enhanced sentence is not an

exceptional sentence. State v. Silva-Baltazar, 125 Wn.2d 472, 475, 886 P.2d 138 (1994). We therefore reject this argument.

The remainder of Ryan's pro se arguments go to the issue of whether the sentencing court or the prosecutor acted in a vindictive manner in imposing this third sentence. We note initially that Ryan was first sentenced to four concurrent life terms without parole and firearm enhancements totaling 240 months, which ran consecutive to the life terms. He was then sentenced to a 68 month term for the robbery and 60 months for the firearm enhancement. He has now been sentenced to 207 months for his four offenses, plus 240 months of firearm enhancements running consecutive to the term for the offenses. The same judge sentenced Ryan on all three occasions.

Any claim that the prosecutor acted in a vindictive manner is without merit. When Ryan appealed his original sentence, he had no legitimate expectation in the finality of any discrete part of it. State v. Larson, 56 Wn. App. 323, 329, 783 P.2d 1093 (1989). In this case, the fact that the first sentences of life without parole were made to run concurrently does not bar the State from arguing for consecutive sentences when a sentence of life without parole is no longer available.

The claim that the sentencing judge acted vindictively is also without merit. A defendant's due process rights are violated in judicial vindictiveness plays a role in resentencing after a successful appeal. State v. Parmelee, 121 Wn. App. 707, 708, 90 P.3d 1092 (2004). "Concerns about judicial

vindictiveness arise when the judge fully considers a sentence and renders a decision, and then, after a successful appeal, changes the sentence without explanation.” Parmelee, 121 Wn. App. at 711. Claims of vindictive sentencing usually arise when a sentence is increased, not, as here, when the sentence is actually less than that originally imposed. There is no presumption of vindictiveness when the aggregate period of incarceration remains the same or is reduced. Larson, 56 Wn. App. at 326-27. State v. Franklin, 56 Wn. App. 915, 920, 786 P.2d 795 (1989). Moreover, the third sentence is within the standard range and governed by sentencing statutes. There is not the slightest hint that imposing this sentence is in any way vindictive. We therefore reject this argument.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Schindler, CT

Appelwick, J